Re Barkwell

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Richard Barkwell

2018 IIROC 49

Investment Industry Regulatory Organization of Canada
Hearing Panel (Pacific District)

Heard: December 11, 2018 in Vancouver, British Columbia
Decision: December 11, 2018
Written Decision: January 9, 2019

Hearing Panel:
Jean Whittow, Q.C., Chair, David Duquette and Bradley Doney
Appearance:
Stacy Robertson, Senior Enforcement Counsel
Richard Barkwell, absent

DECISION ON THE ACCEPTANCE OF SETTLEMENT AGREEMENT

¶ 1 This hearing was convened to consider a settlement agreement between IIROC and the respondent Richard Barkwell (the "Respondent"), dated December 11, 2018 (the "Settlement Agreement"). The Settlement Agreement is attached as an appendix to this decision.

¶ 2 For the reasons detailed below, the Panel accepted the Settlement Agreement.

¶ 3 The Respondent admitted to the following contraventions of the IIROC Dealer Member Rules:

Between April 2014 and January 2017, Richard Barkwell engaged in personal financial dealings with clients, contrary to Dealer Member Rule 43.

¶ 4 The agreed upon penalties were:

a. a fine of $10,000

b. suspension from any and all registration capacities with IIROC for 12 months; and

c. the Respondent must rewrite the Conduct and Practices Handbook course ("CPH") prior to any registration with IIROC.

Facts

¶ 5 The agreed upon facts are set out in Part III of the attached Settlement Agreement

¶ 6 This case concerns the Respondent's conduct in procuring loans from three related clients: UE, BR and DE. In April 2014, the Respondent borrowed a total of $45,000 (the "First Loan") from these three clients, with

a simple interest rate of 55% per annum. The Respondent repaid $1,000 on June 25, 2014, but made no further payments. On July 14, 2015, the Respondent signed an acknowledgement that he now owed UE, BR and DE $74,174, inclusive of interest, on the First Loan. In 2016, the Respondent borrowed an additional $4,500 from UE and BR (the "Second Loan").

¶ 7 At the time of the First Loan, the Respondent was employed with Raymond James Ltd., and UE and BR were his clients at that firm. Raymond James was unaware of the First Loan for the duration of the Respondent's employment.

¶ 8 The Respondent was self-employed outside of the securities industry from February 2015 to February 2016. He then became a Registered Representative with Edward Jones in February 2016. UE, BR & DE became clients of the Respondent with Edwards Jones. In January 2017, an internal compliance review at Edward Jones revealed the loans, and the Respondent was terminated for having inappropriate personal financial dealings with clients.

¶ 9 The Respondent is not currently a Registered Representative.

¶ 10 On July 19, 2018, the Respondent made an assignment in bankruptcy which included the loans received from UE, BR, and DE among his outstanding debts.

¶ 11 The Respondent acknowledges that if not for his inability to pay, the agreed fine would have been higher and an order for costs would also have been made.

Analysis

¶ 12 It is well-established that that a hearing panel should accept a negotiated settlement unless it is clearly outside the range of acceptable outcomes. Enforcement Counsel referred to a long line of relevant authorities confirming this principle, such as Re Donelly, 2016 IIROC 23 and Re Deutsche Bank Securities Ltd., 2013 IIROC 07.

¶ 13 Dealer Member Rule 43.2 prohibits personal financial dealings between a registered representative and clients. The limited exceptions to this prohibition (Rule 43.2(3)) were not applicable.

¶ 14 As regards the penalty, Enforcement Counsel referred the Panel to the Dealer Member Disciplinary Sanction Guidelines and to a number of cases concerning similar misconduct.

¶ 15 Enforcement Counsel submitted that the Sanction Guidelines supported the imposition of a suspension, based upon the seriousness of the contravention, its duration and the personal benefit to the Respondent. Counsel expressly noted the mitigating factors; that is that the Respondent has no prior disciplinary record, was terminated from his employment and that by entering the Settlement Agreement, has accepted responsibility for his conduct.

¶ 16 Enforcement Counsel referred the Panel to a series of cases in which significant fines, suspensions, and a requirement to re-write the CPH have been imposed as penalties for engaging in personal financial dealings with clients, particularly the procuring of loans.

¶ 17 For example, in Re Siska, 2015 IIROC 13, the contravention was a loan of $13,000 from five clients without the knowledge of the respondent's firm, which the respondent had repaid prior to the settlement. The panel approved a settlement, which consisted of a fine of $15,000, a one-month suspension, 12 months of strict supervision upon re-entry, re-write of the CPH and costs of $3,000.

¶ 18 In Re Gunderson, 2012 IIROC 66, the relevant contravention was procuring loans totalling $133, 900 from eleven clients. The panel referred to the old Sanction Guidelines Section 2.5 – Undisclosed Business with a Client – which suggested a minimum fine of $10,000 for such an offense. In that case, the settlement consisted of a $25,000 fine, one-month suspension, re-write of the CPH and costs of $3,000.

¶ 19 Enforcement Counsel made submissions regarding the impact of the Respondent's impecuniosity on the

appropriate penalty. He submitted that, in a case of borrowing from a client, the minimum penalty is disgorgement of any unpaid amount plus a fine of $10,000 to $20,000, unless there is a demonstrated inability to pay.

¶ 20 For this proposition, Enforcement Counsel referred to Re Kloda, 2016 IIROC 50 and Re Sawinsky, 2017 IIROC 28. In Re Sawinsky, a panel approved a settlement agreement including a fine of $10,000, acknowledging that if not for the respondent's inability to pay, similar cases warranted fines around $20,000.

¶ 21 In Re Kloda, the panel approved a 3 year suspension and total financial penalties of $10,000. That panel accepted an affidavit setting out the respondent's dire financial circumstances. It held that the "very long suspension of 3 years…equilibrates the very low fine". This reasoning supports the agreed penalty in the Settlement Agreement, which calls for a suspension longer than in a number of precedent cases, but with a lower financial penalty.

¶ 22 The Panel is satisfied that if the Respondent had an ability to pay, the settlement would likely include greater financial penalties. However, we are satisfied that the Respondent's bankruptcy renders him unable to pay a greater amount.

Conclusion

¶ 23 The Panel notes the similarities in contraventions and circumstances between the case at hand and the precedent cases. It has taken into account the Respondent's demonstrated inability to pay a greater financial penalty.

¶ 24 In summary, the Panel is satisfied that the Settlement Agreement is well within the range of acceptable outcomes. For these reasons, the Settlement Agreement was accepted.

Dated at Vancouver, British Columbia this 9 day of January 2019.

Jean Whittow

David Duquette

Bradley Doney

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Richard Barkwell ("Respondent").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

Overview

4. In April 2014, the Respondent borrowed approximately $49,500 from a group of related clients while he was a Registered Representative with Raymond James Ltd.

5. Dealer Member Rule 43 prohibits any borrowing from clients unless specific conditions are met. None of the conditions which would allow the loans, applied to the Respondent. Raymond James Ltd. was unaware of the loans while the Respondent was employed with them.

6. The Respondent commenced employment with Edward Jones in February 2016 while the loans were still outstanding. Edward Jones was not aware of the loans and terminated the Respondent when it became aware of the loans.

Background

7. The Respondent became registered with IIROC and its predecessor organizations in 2002. He worked at Raymond James from 2008 until February 2015. From February 2015 to February 2016, the Respondent was self-employed outside of the securities industry. He was a Registered Representative with Edward Jones from February 2016 until January 2017 when he was terminated. The Respondent is not currently a Registered Representative.

The Client Loans

8. In or around April 25, 2014, the Respondent borrowed a total of $45,000 in one loan transaction from a group of three related clients, UE, BR and DE (the "First Loan"). The loan carried a simple interest rate of 55% per annum. The Respondent repaid $1,000 on June 25, 2014. As of February 2018, no further payments have been made on the First Loan.

9. Both prior to April 25, 2014 and after, UE and BR were clients of the Respondent at Raymond James. Raymond James Ltd. was unaware of the First Loan while the Respondent was employed with them.

10. The Respondent signed an acknowledgement dated July 14, 2015 that he owed UE, BR and DE $74,174, inclusive of interest on the First Loan. The acknowledgement confirms the $45,000 principal amount and the payment on June 25, 2014 of $1,000.

11. In 2016, the Respondent borrowed an additional $4,500 from UE and BR (the "Second Loan").

12. In February 2016, the Respondent became a Registered Representative with Edward Jones. BR and DE became clients of the Respondent at Edward Jones in February 2016 while the First and Second Loans were still outstanding. UE was already a client of Edward Jones when the Respondent started employment with Edward Jones and became his client in March 2016 while the First and Second Loans were still outstanding.

13. Edward Jones was not aware of the existence or status of the First or Second Loans.

14. In January 2017, Edward Jones learned about the Respondent's loans from an internal compliance review and terminated his employment for the inappropriate and undisclosed personal financial dealings with clients.

15. The Respondent made an assignment in bankruptcy on July 19, 2018 and included the loans to BR, DE and UE as part of his outstanding debts.

16. The Respondent acknowledges that if not for his inability to pay, the agreed fine would have been higher and that an order to pay costs would also have been made.

PART IV – CONTRAVENTIONS

17. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules: Between April 2014 and January 2017, Richard Barkwell engaged in personal financial dealings with clients, contrary to Dealer Member Rule 43.

PART V – TERMS OF SETTLEMENT

18. The Respondent agrees to the following sanctions and costs:

    a) Pay a fine of $10,000 to IIROC;

    b) 12 month suspension from registration in any capacity with IIROC; and

    c) Re-write Conduct and Practices Handbook course prior to any registration with IIROC.

19. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

20. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.

21. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

22. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

23. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.

24. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

25. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.

26. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.

27. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

28. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.

29. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.

30. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

31. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

32. A fax or electronic copy of any signature will be treated as an original signature.

DATED this __6th_ day of __November___, 2018.

"Witness"
Witness

"Richard Barkwell"
Respondent, Richard Barkwell

"Witness"
Witness

"Stacy Robertson"
Stacy Robertson

Enforcement Counsel on behalf of Enforcement Staff of the Investment Industry Regulatory Organization of Canada

The Settlement Agreement is hereby accepted this _11th_ day of _December__, 2018 by the following Hearing Panel:

Per: "Panel Chair"
Panel Chair

Per: "Panel Member"
Panel Member

Per: "Panel Member"
Panel Member